Editor's note: Appeal filed, George Ruth, et al v. U.S., No. 96-286 C (Cl.Ct. May 22, 1996) -- not an appeal of this decision but involves it indirectly

GEORGE H. RUTH
ROBERT E. TUDOR

IBLA 89-422 Decided Octobere 10, 1991

Appeal from a decision of the Eastern States Office, Bureau of Land Management, denying petition requesting the agency to file an action of ejectment against the successors-in-interest to the patentee of a homestead entry and claiming a right to compensation. ES AR BLM-019427 LB.

Affirmed.

1. Patents of Public Lands: Suits to Cancel

> The Department is barred by provision of 43 U.S.C. § 1166 (1988) from challenging the sufficiency of a patent issued to the widow of a homestead entryman in 1881, since more than 6 years have passed after the patent issued.

APPEARANCES: George H. Ruth and Robert E. Tudor, pro sese; Barry E. Crowell, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management; David T. Ruth, Greeley, Colorado.

OPINION BY ADMINISTRATIVE JUDGE GRANT

George H. Ruth and Robert E. Tudor have appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), received April 4, 1989, which denied the relief requested in their petition previously filed with BLM. 1/ The petition, purportedly filed on behalf of the heirs of Georga 2/ McAlister, requested BLM to file an action of ejectment on behalf of the heirs against the current record titleholders of 80 acres of land in Arkansas. The land at issue was originally included

1/ Although the return receipt card in the case file for BLM's decision is dated Apr. 4, 1988, this is evidently an error, for appellants' petition was not filed with BLM until July 1988 and the notice of appeal notes that the decision was received on Apr. 4, 1989.
2/ The first name of Georga McAlister has been spelled "Georgia" on at least one occasion in the record. We have adopted the spelling used in the petition.

within a homestead entry patented to Sarah F. A. McAlister, mother of Georga McAlister, in 1881. 3/ In addition, Ruth and Tudor demanded payment in the amount of $50,000,000 on behalf of the heirs of Georga E. McAlister on the ground that they were wrongfully deprived of the exclusive use, benefit, and possession of the lands that were included within the original homestead entry of Napoleon B. McAlister and subsequently patented to his widow, Sarah F. A. McAlister. The factual background and the pertinent sections of the homestead laws relating to appellants' claims were succinctly set forth in the BLM decision as follows:

> According to the General Land Office records on file with BLM and the National Archives, on October 19, 1872, Napoleon B. McAlister entered the SW¼ NW¼ of Section 28 and the SE¼ NE¼ of Section 29, T. 3N., R. 29W., Fifth Principal Meridian, Arkansas under the provisions of the Homestead Act of May 20, 1862, 12 Stat. 392. Among other things, Section 2 of the Act provides that a final certificate and patent shall issue to an entryman upon the submission of final proof that he has resided upon or cultivated the land for a five-year period immediately succeeding the entry. Napoleon B. McAlister died on December 1, 1873, and was survived by his widow, Sarah F. A. McAlister and a minor daughter, Georga E. McAlister. Under the provisions of R.S. §2291 [43 U.S.C. § 164 (1982) (repealed by Federal Land Policy and Management Act of 1976, P.L. 94-579 (FLPMA), § 702, 90 Stat. 2787)], if the person making such entry dies, then his widow, or in case of her death his heirs or devisee, upon making final proof that the terms of the Act have been met, shall be entitled to a patent. Pursuant to the statute, Sarah F. A. McAlister submitted final proof dated November 24, 1877, and Final Certificate 2261 was issued in her name on June 27, 1878. Sarah F. A. McAlister died on December 18, 1879. A patent issued in the name of Sarah F. A. McAlister on December 30, 188[2], [4/] and is recorded with BLM in Dardanelle Homestead Volume 5, page 325. Records submitted by both the petitioners and David T. Ruth indicate that the land covered by the homestead was conveyed by third

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3/ David T. Ruth of Greeley, Colorado, acting on behalf of the heirs of other children of the patentee, Sarah F. A. McAlister, contacted BLM after appellants asserted their claims and contested the allegations contained in the petition. He filed with BLM a response to the contentions raised in the petition. It appears from the record that a copy of this submission was provided by BLM to appellant Robert E. Tudor.

David T. Ruth has also appeared before the Board and filed a "paragraph by paragraph" response to appellants' statement of reasons in this appeal, asserting that he is an adverse party to any action on the patent in that he is also a descendant of Georga E. McAlister, i.e., Sarah McAlister is his great-grandmother. He characterizes the development of this case as a "family dispute" and asks that the Board consider his brief in support of BLM's decision (Response at 1).

4/ Although the quoted portion of the decision gives the date as 1881, copies of the patent in the record disclose the date as Dec. 30, 1882.

> parties some time between the date of Sarah F. A. McAlister's death and the date of the patent. Presumably, the current record title holders claim under those conveyances. Records submitted by David T. Ruth indicate that the conveyances were made by the executor of the estate of Sarah F. A. McAlister pursuant to an order of the Probate Court. [Footnote omitted.]

(BLM Decision at 2).

Appellants do not contest this statement of the facts. In addition, they do not dispute that the homestead entry was valid, or that Sarah F. A. McAlister was the proper person to make final entry and receive a final certificate in her name. The essence of appellants' claim is that upon the death of Sarah F. A. McAlister, all right to the homestead vested in Georga E. McAlister, a surviving minor child, as a beneficiary under the provisions of the homestead laws, R.S. 2291, 2292, 43 U.S.C. §§ 164, 171 (1982) (repealed by FLPMA, P.L. 94-579, § 702, 90 Stat. 2787).

In addition, appellants challenge the issuance of the patent in the name of Sarah F. A. McAlister, pointing out that the patent was never delivered to or accepted by the patentee. They assert that until such delivery and acceptance occurs, the legal title remains vested in the United States, in trust for the heirs of Georga E. McAlister. Therefore, they maintain that any conveyances of the homestead property by third parties were necessarily unauthorized and have no legal force and effect and the United States has the obligation to provide clear title to the heirs of Georga E. McAlister.

BLM rejected appellants' theories of the case, finding that appellants incorrectly interpreted the sections of the law they rely upon for their contentions. They failed to recognize the legal significance of the issuance of the final certificate and the consequences that flow from such issuance. Citing two Supreme Court decisions as dispositive of the issues raised by appellants' claims, Bernier v. Bernier, 147 U.S. 246 (1892), and Doran v. Kennedy, 237 U.S. 362 (1915), BLM found that the cited provisions of R.S. 2291 and R.S. 2292 had no relevance to this situation where the entry had already been perfected and the final certificate issued to the entryman's widow, stating:

> The analysis of R.S. §2291 and R.S. §2292 as set forth in the Bernier and Doran decisions clearly indicates that the provisions of those sections are for the limited purpose of establishing who may perfect a homestead entry when the entryman dies prior to making final proof. Once final proof is made, equitable title vests and the lands are freely transferrable by the person making final entry. Such interest is a property right the disposition of which is subject to the jurisdiction of the probate courts. If Georga E. McAlister had any rights to the homesteaded property after the death of Sarah F. A. McAlister, they were rights inuring under the probate laws of the state and not pursuant to statutes administered by the United States.

(BLM Decision at 5).

BLM also rejected petitioners' argument that failure of the United States to deliver the patent prevented the vesting of legal title in the patentee. BLM pointed out that the Supreme Court has held that a patent made out in the proper office, signed, sealed, and recorded "becomes a solemn public act of the government of the United States, and needs no further delivery or other authentication to make it perfect and valid." United States v. Schurz, 102 U.S. 378, 397 (1880). BLM concluded:

> Since delivery of the patent is not necessary in order to pass legal title from the United States, legal title vested in the patentee subject to the provisions of R.S. §2448 [Act of May 20, 1836, ch. 76, 5 Stat. 31 (repealed by FLPMA, P.L. 94-579, § 705(a), 90 Stat. 2792, formerly codified at 43 U.S.C. § 1152 (1970))] as of December 30, 1882. Issuance of the patent terminated any further obligations on the part of the United States, and the Department of the Interior has no further authority to consider matters relating to the case. Based upon consideration of the arguments and exhibits submitted by the petitioners as well as records on file with the BLM and National Archives, we conclude that all actions and duties carried out by the General Land Office were proper and in accord with relevant statutes and established procedures. Any claims that the petitioners may have are a result of transactions under the jurisdiction of the state probate courts and are not within the authority of the Department of the Interior. Accordingly, the petition submitted by George H. Ruth and Robert E. Tudor is hereby denied.

(BLM Decision at 7).

In their statement of reasons (SOR) for appeal appellants reiterate the same arguments raised before BLM, complaining also that from the time Sarah F. A. McAlister received her final certificate

> it took 4 years & 6 months for the "alleged" legally issued patent to issue. It can be assumed that the Government should have a fair and reasonable amount of time in issuing there [sic] patents, but 4 years and 6 months is well beyond a fair and reasonable amount of time to attempt to complete the land grant.

(SOR at 3).

Appellants take issue with BLM's application of the cited Supreme Court cases to the Sarah F. A. McAlister patent, asserting they are not applicable because they were not timely. Appellants argue that the governing law should be found in the statutes themselves rather than in cases applying those statutes many years later.

They also allege, inter alia, that BLM erroneously applied section 2448 of the Revised Statutes to the facts of this case. They maintain that R.S. 2448 is applicable only in those circumstances where the entryman has perfected title prior to his death and is not intended to apply to a situation where both the entryman and his wife have died before a patent has issued (SOR at 4).

As a threshold matter, we note that BLM appears to have properly applied the relevant statutes and judicial precedents in its analysis of this case. Thus, R.S. 2291, 43 U.S.C. § 164 (1982), provided that upon the death of the entryman, his widow, after making proof of compliance with the statutory requirements, is entitled to a patent. That is what happened in this case, i.e., after the death of the entryman the widow provided proof of entitlement to a homestead. It is also true under the terms of this statute that, in the event of the death of both the entryman and his widow prior to final proof, the right of the heirs or devisees of the entryman to prove entitlement to a patent was explicitly recognized. Related protection of the rights of minor children in homesteads where final proof has not been submitted is provided by R.S. 2292, 43 U.S.C. § 171 (1982), which authorizes the sale of the land by a guardian for their benefit and issuance of patent to the purchaser. While appellants argue that this latter statute required issuance of patent to the surviving minor child, such a result is inconsistent with the provision of statute at R.S. 2291 recognizing the right of the surviving widow to prove entitlement to a homestead. Appellants' assertion is also in conflict with the provision of statute at R.S. 2448 (repealed by FLPMA, P.L. 94-579, § 705(a), 90 Stat. 2792) (formerly codified at 43 U.S.C. § 1152 (1970)) which provided that:

> Where patents for public lands * * * may be issued, in pursuance of any law of the United States, to a person who has died before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

Any doubt as to resolution of the conflict between the right of the heirs of the deceased entryman to receive patent in their own name directly under R.S. 2291 and the rights of those deriving their interest through the decedent's estate was resolved by the United States Supreme Court in the case of Doran v. Kennedy, supra. In that case the Court was called upon to resolve the conflict between the claim to the homestead of the deceased entryman made by the heir of the entryman claiming entitlement under the homestead statute and one claiming as a creditor of the entryman through his estate. The Court held that where the entryman had made final proof and become entitled to patent before his death he was the equitable owner of the land which was subject to his disposition by contract or by will. 237 U.S. at 366-67. Thus, in accordance with R.S. 2448, the homestead became an asset of the estate upon the death of the entryman regardless of the fact patent was not issued in his name until after his death. Id. 5/

5/ Appellants' challenge to the relevance of Supreme Court cases decided years after enactment of the statutes applied therein is without merit and reflects a basic misunderstanding as to the role of case law in establishing precedents involving the proper application of statutes. No showing has been made that the cases cited have been overruled.

Consequently, on the facts of the present case, it must be concluded that patent was properly issued to the widow who proved entitlement to the homestead, Sarah McAlister, regardless of the fact that patent was not actually issued until after her death.

[1] Further, as noted in the BLM decision, there is a fundamental bar to the relief which appellants seek. In this case the issuance of patent to Sarah F. A. McAlister in 1882 operated to divest the Department of authority to adjudicate rights in the patented land. Germania Iron Co. v. United States, 165 U.S. 379 (1897); see Ed Bilderback, 89 IBLA 263 (1985). Moreover, when more than 6 years have passed since issuance of patent, further consideration of the patent's validity by the Department is barred by provision of 43 U.S.C. § 1166 (1988). See Terry L. Wilson, 85 IBLA 206, 222 92 I.D. 109, 118 (1985); Rosander Mining Co., 84 IBLA 60, 64 (1984). Section 1166 provides that "[s]uits brought by the United States to vacate and annul any patent shall only be brought within six years after the date of issuance of such patents." As pointed out in Wilson and Rosander, the practical legal effect of section 1166 is to prevent any further consideration of such claims by the Department, since the statute operates to deprive the Department of the power to affect title to the land. Lynn M. Sheppard, 90 IBLA 23, 26, 92 I.D. 613, 615 (1985).

Since we find no merit in appellants' case, there could be no possible basis for any consideration of their claim for compensation in the amount of $50,000,000. However, we must note that this Board has no jurisdiction to grant relief of this nature. The jurisdiction of the Board of Land Appeals is limited to that authority delegated by the Secretary of the Interior which is set forth in the Departmental regulations at 43 CFR Part 4. The Board is authorized to issue final decisions for the Department in appeals from decisions of BLM officials relating to the use and disposition of the public lands and their resources. 43 CFR 4.1(b)(3). Awards of compensation in the form of monetary damages for breach of contract or other potentially actionable conduct are beyond the scope of the jurisdiction delegated to the Board. See Exxon Corp., 95 IBLA 374 (1987).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the BLM Eastern States Office is affirmed.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge